STATE OF MICHIGAN
IN THE SUPREME COURT

MARLETTE AUTO WASH, LLC,
Plaintiff/Cross-Defendant/Appellant,

v.

VAN DYKE SC PROPERTIES, LLC,
Defendant/Cross-Plaintiff/Appellee.

Supreme Court No. 153979
Court of Appeals No. 326486

BRIEF OF AMICUS CURIAE
ON BEHALF OF THE REAL PROPERTY LAW SECTION STATE BAR OF MICHIGAN

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Amicus Curiae, Real Property Law Section of the State Bar of Michigan, states that this Court has jurisdiction pursuant to MCR 7.303(B) and MCR 7.305, on Application for Leave to Appeal from the May 10, 2016 Opinion of the Court of Appeals having been timely filed on June 21, 2016. For the reasons set forth below, this Court should grant leave to appeal to consider the questions presented by the Application for Leave to Appeal and the Response to the Application for Leave to Appeal and set forth in this Brief Amicus Curiae.

STATEMENT OF QUESTIONS ADDRESSED

1. Does a prescriptive easement exist where appellant failed to demonstrate continuous and uninterrupted use of the disputed property for a period of 15 years?

Court of Appeals Answered: No.

Appellant Answers: Yes.

Amicus Curiae Answer: No.

2. Is judicial or other action required by one claiming a prescriptive easement before title to the easement will vest in him and run with the dominant estate as an easement appurtenant, without tacking?

Court of Appeals Answered: Yes.

Appellant Answers: No.

Amicus Curiae Answer: Yes.

I. INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

The Real Property Law Section of the State Bar of Michigan ("RPLS") is a voluntary membership society of the State Bar of Michigan. Membership in the RPLS is open to all members of the State Bar of Michigan, but generally comprises attorneys who practice and are interested in real property law. Currently there are 3,555 members of the section. The mission of RPLS is to provide education and information on real property law issues as well as advocacy in the Legislature and in precedential cases involving important legal and policy considerations in the area of real property law.

The RPLS authorized preparation of this amicus curiae brief in accordance with the bylaws of the section at a meeting of the RPLS Council on September 22, 2016. Thirteen out of 18 voting members were in attendance. The motion was approved with 12 in favor, none against, and one abstention. The State Bar of Michigan has no position in this matter; the positions expressed are those of the RPLS only.

The RPLS files this brief in support of the Application for Leave to Appeal, asking the Supreme Court to grant leave and address the issues raised by the appeal. The decision of the Court of Appeals raises questions of major significance to the state's jurisprudence.

The Application for Leave to Appeal was filed by Plaintiff/Counter-Defendant/Appellant Marlette Auto Wash, LLC ("Marlette AW"), which seeks review of the unpublished decision rendered in this matter by the Court of Appeals on May 10, 2016. In a unanimous decision, the court rejected Marlette AW's claim of a prescriptive easement over the Appellee's parking lot, on the grounds that Marlette AW had not used the disputed property for the required 15 years, and could not tack its use to its predecessor-in-interest because it lacked privity of estate. The court disagreed with Marlette AW's contention that it was not required to show privity because a previous owner of the car wash used the parking lot continuously for the requisite 15-year period and thus title to the prescriptive easement had already vested and ran with the property despite the lack of privity. The court noted that no previous

owner of the car wash had acknowledged or acted on the purported acquired right and therefore the right had not vested.

Marlette AW has appealed this decision to the Supreme Court, urging the Supreme Court to "take this action to re-establish that a prescriptive easement vests when the statute of limitations expires and then runs with the land, regardless of whether a legal claim was ever asserted." Marlette AW cites to prior case law holding that (1) title to a prescriptive easement vests when the limitations period expires, not when an action regarding title to the property is brought; and (2) once established, a prescriptive easement is an easement appurtenant and runs with the land whether or not it is mentioned in the deed.

The ruling sought by Marlette AW - that in all cases a prescriptive easement automatically vests 15 years after the use began and thereafter runs with the land even in the absence of establishing 15 years of continuous use by the current adverse possessor - is not sound. Such a ruling would be unfair to property owners and the title insurers as it would give rise to unrecorded easements that are not known and cannot be determined currently. Taken to its logical extreme, an owner of property could claim prescriptive easement rights over property many years after the use had been abandoned, by showing some 15 year period of use over the course of the property's history. There would be no way for a potential purchaser to know or determine if such rights exist, because no current use would be required to evidence them. Furthermore, a buyer of property unaware of any such rights at the time of purchase would have no reasonable expectation of obtaining those rights, one of the implicit policy underpinnings of the doctrine of prescriptive easements, and indeed, adverse possession more generally.

On the surface, the Court of Appeals' decision could be interpreted as conflicting with prior decisions of this Court. Furthermore, another panel of the Court of Appeals recently issued an opinion which potentially conflicts with the *Marlette* decision on this issue. In *Methner v. Village of Sanford*,

Court of Appeals No. 326781 (August 23, 2016), the court wrote: "However, if the use by plaintiffs' predecessor in title…satisfied the elements of a prescriptive easement, then plaintiffs acquired that easement when they purchased the property, even if it was not mentioned in the deed or the parties' dealings." Therefore, it would be prudent for this Court to grant the application for leave to appeal and clarify the rules regarding prescriptive easements and the requirement of privity of estate. The position of the RPLS is that the Court of Appeals opinion in *Marlette* is correct. A prescriptive easement does not automatically become an easement appurtenant when the statutory period expires. It becomes an easement appurtenant when the prescriptive easement is established, and only a court can determine if all of the elements have been established. The court may determine that vesting occurred years before, but the easement should not be deemed an appurtenance which runs with the land until it has been established. If there has been no such prior determination or action to establish the easement appurtenant, then a party bringing a claim for prescriptive easement must himself fulfill all of the required elements, including fifteen years of continuous use, which may include a predecessor's use through tacking, but only if there is privity of estate.

II. STATEMENT OF FACTS

RPLS relies upon the Statement of Facts provided in Defendant/Counter-Plaintiff/Appellee's Response to Application for Leave to Appeal. The most relevant facts are as follows.

Plaintiff Marlette AW seeks a prescriptive easement through the parking lot of the adjacent shopping center owned by defendant Van Dyke SC Properties ("Van Dyke") for its customers to access the car wash bays. Marlette AW purchased the car wash in 2007 from a bank's holding company following foreclosure proceedings. The shopping center was in disrepair and shut down in 2009, but Van Dyke purchased and reopened the shopping center in 2013. The principal of Van Dyke, James Zyrowski, had been the original owner of the car wash, and admitted that when he owned the car wash from 1989 until 2005, the parking lot was used to access the car wash. Zyrowski sold the car

wash in 2005 to Lipka Investments, but Lipka lost the property in 2006 when it conveyed the property to the bank via a deed in lieu of foreclosure. The bank almost immediately transferred the property to its holding company. The dispute between Marlette AW and Van Dyke arose in 2013 when Van Dyke asked Marlette AW to contribute toward parking lot expenses and to enter into a lease for a portion of the parking lot. Marlette AW refused and soon thereafter commenced suit claiming that a prescriptive easement allowing such use existed. The trial court found that a prescriptive easement benefiting the car wash had vested in 2005 and ran with the land thereafter.

Van Dyke appealed to the Court of Appeals, which reversed the trial court on the grounds that Marlette AW had failed to establish continuous use of the parking lot for a period of 15 years because its own period of use was far less than the statutory 15 years and it lacked privity of estate with its predecessors-in-interest in order to tack to their period of use. The deed to Marlette AW did not describe the disputed property and there was no evidence that, at the time of conveyance, the parties discussed an easement or access to the car wash via the parking lot. The prior two transfers also did not meet the requirements for privity.

Marlette AW argued that it was not required to demonstrate privity of estate because a previous owner of the car wash used the parking lot continuously for the requisite 15-year period and thus the prescriptive easement vested at that time and became an easement appurtenant and ran with the land without the current possessor needing to tack to that prior possessor. There being no need to tack, establishing privity of estate was not required. The Court of Appeals wrote:

> We disagree. It is true that a prescriptive easement, like property acquired through adverse possession, vests when the statutory period expires and not when the action is brought. *See [Matthews]* at 36. However, the person claiming a prescriptive easement must acknowledge or act on the purported acquired right; "the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in *the party* claiming adverse possession. *Gorte v. Dep't of Transp.*, 202 Mich. App. 161, 168; 507 N.W. 797 (1993)(emphasis added). It is undisputed that no previous owner of the car wash asserted a claim of prescriptive easement with regard to defendant's property.

> And plaintiff failed to cite any legal authority in support of its argument that privity of estate need not be shown after the 15-year statutory period is met *at any time and by any previous owner* because the owner of the servient property automatically loses his title when the statute of limitation expires. While a presumption of a prescriptive easement may arise when a party shows that the use has been in excess of the prescriptive period by many years, *Reed v. Soltys*, 106 Mich. App. 341, 346; 308 N.W.2d 201 (1981), no such presumption arose in this case.

This appeal followed.

III. ARGUMENT

1. A prescriptive easement does not exist where the claimant fails to demonstrate his continuous and uninterrupted use of the disputed property for a period of 15 years.

The Court of Appeals correctly held that Marlette AW had failed to satisfy the requirements for a prescriptive easement. A prescriptive easement is grounded on the legal fiction that a landowner has granted an interest to an adverse claimant (sometimes referred to as a lost grant), whether through the owner's active consent or mere acquiescence. *Slatterly v. Madiol*, 256 Mich App 242, 260 (2003). It is well settled that,"[a] prescriptive easement results from open, notorious, adverse, and continuous use of another's property for a period of 15 years." *Matthews v. Dep't Nat. Resources*, 288 Mich App 23, 37 (2010). "A party may 'tack' on the possessory periods of a predecessor in interest to achieve the fifteen-year period by showing privity of estate. This privity may be shown in one of two ways, by (1) including a description of the disputed acreage in the deed, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance." *Killips v. Mannisto*, 244 Mich App 256, 258 (2001). "It has long been the rule in Michigan that the statutory period of possession or use necessary for obtaining title by adverse possession or easement by prescription is not fulfilled by tacking successive periods of possession or use enjoyed by different persons in the absence of privity between those persons, established by inclusion by reference to the claimed property in the instruments of conveyance or by parol references at time of conveyances."

Siegel v. Renkiewicz, 373 Mich 421, 425; 129 NW2d 876 (1964). The party claiming a prescriptive easement has the burden of establishing it by clear and cogent evidence. *Matthews* at 37. It is clear that failure of any of the elements means the claim is lost. Here, the Court of Appeals correctly held that Marlette AW could not establish continuous use for 15 years because it had only owned the property since 2007, and it could not tack with its predecessor because there was no privity.[1]

In applying the prescriptive easement doctrine, the Court of Appeals in *Marlette* began its analysis at the time of the claim and looked backwards 15 years to determine if there had been continuous use for the statutory period. In other words, the current claimant must show that his use of the disputed property meets the requirements for a prescriptive easement. That is in fact how the analysis is applied in virtually every prescriptive easement case decided by the Michigan courts. Under Marlette AW's theory, however, the analysis is different. It begins at the time that the purported adverse use begins and runs forward 15 years. This approach means that if any prior owner of the property in history met the requirements for a prescriptive easement, the current claimant does not have to meet any of the requirements on his own, even if the prior use has ceased to be open, notorious, adverse, and continuous. Adopting Marlette AW's position would completely undermine the long line of Michigan cases, from *Siegel* to *Killips*, requiring the claimant to show that he can satisfy all of the elements required for a prescriptive easement including continuous use for 15 years.

2. **The line of cases involving continuous adverse use for many years cited by Marlette AW should be distinguished from the case at bar and should not serve as controlling authority.**

The few cases cited by Marlette AW in support of its position that an easement appurtenant arises at the end of the prescriptive period, even if the cited possession occurred in the past, should be

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[1] Although the Court of Appeals did not mention it, it appears that there was an actual break in the use of the parking lot for access to the car wash in 2006, when the car wash was owned by the bank. Therefore, even if there was privity between Marlette and the bank, the claim would still fail.

distinguished on their facts. These cases describe the only circumstance in which a current claimant that cannot show continuous possession for the prescriptive period has not been required to tack to prior possessors (and thus raise the issue of privity of estate) in order to satisfy the continuity element. The situation involves a prescriptive use in place beyond the statutory period by many years. In that case, Michigan courts have held that the presumption of a grant arises and the burden shifts to the servient estate owner to show that the use was merely permissive. *Beechler v Bylerly*, 302 Mich 79, 83; 4 NW2d 475 (1942). "When a passageway has been used openly and notoriously for over a quarter of a century, it is unnecessary to show by positive testimony that the use was claimed as a matter of right, but after such use[] the burden is on the [servient estate owner] to show that the use was only permissive." *Haab v Moorman*, 332 Mich 126, 144; 50 NW2d 856 (1952), citing *Berkey & Gay Furniture Co v Milling Co*, 194 Mich 234 (1916). *See also Wortman v Stafford*, 217 Mich 554; 187 NW 326 (1921). If the servient estate owner is unable to rebut the conclusive presumption of a grant of easement, the claimant can prevail without showing privity.

In *Wortman*, for example, the defendant's property was only accessible by crossing plaintiff's property, and the issue was whether defendant had an easement to use the passageway. Defendant's father had purchased the property 40 years before, and defendant contended that he also purchased easement rights. The plaintiff contended that it was merely a license which could not ripen into a permanent easement. Defendant's father had built two fences on plaintiff's property to create a lane which he used for over 30 years until his death when the property passed to his son. The Court held that the undisputed use of the lane for so many years gave rise to the presumption of a grant of easement that the plaintiff failed to rebut. *Id.* at 559. The court further stated that the defendant was not required to tack his use to his father's use:

> The question of the continuity of possession and use[] by successive holders in privity to sustain title by prescription is not involved here. The statute of limitations had run its course in his favor long before the elder Stafford died. Like peaceable

> possession and use[] continued thereafter by his successors as of right and not of sufferance was but confirmatory of his established easement. Aside from the conclusive presumption of a written grant from open and continuous adverse use[] for much longer than the statutory period of prescription, the facts in this case touching the original transaction are persuasive of the purchase of a perpetual right of way…."

Id. at 560.

Similarly, in *Haab*, where the disputed alley had been used openly, obviously and continuously for over 100 years, the Court held that the plaintiff was not required to tack his adverse holding to his predecessor's to establish a prescriptive easement, because the easement was already established and became an easement appurtenant that was conveyed with the deed to the property even if not expressly mentioned. 332 Mich. at 143-144.

Haab and *Wortman* are problematic in the current context to the extent they can be broadly construed, as Marlette AW tries here, to mean that an easement appurtenant automatically springs into being and attaches to land as soon as the prescriptive period passes, and is thereafter conveyed to subsequent property owners regardless of continuity of use or privity of estate. In fact, such broad construction was only recently applied in *Methner*, where the Court of Appeals seemed to rely on that notion to find a prescriptive easement in plaintiffs' favor. In that case, testimony established that the disputed property had been used to access plaintiffs' property for at least 60 years. The plaintiffs acquired their property in 2011 and therefore did not have the required 15 years of use on their own. Citing *Haab*, the Court of Appeals wrote: "However, if the use by plaintiffs' predecessor in title, Howson, satisfied the elements of a prescriptive easement, then plaintiffs acquired that easement when they purchased the property, even if it was not mentioned in the deed or the parties' dealings." This statement is unnecessarily broad and must be clarified. Read in isolation, it seems to support Marlette AW's position. Read in the appropriate factual context, however, it is clear that the Court of Appeals was attempting to apply the principles of *Haab*, in a situation involving open, notorious and

continuous use of a purported easement for many decades (like *Haab*), but instead reiterated and focused on the overly broad language used in *Haab* as its justification

Wortman, *Haab* and *Methner* should be confined to the specific factual context in which they were decided. That is, where the disputed property has been used openly, notoriously and continuously, etc., for decades, a presumption of a grant of easement arises, and that easement is an appurtenance that may be conveyed to a subsequent owner even if not expressly mentioned in the deed. Those decisions should not be enlarged and extended as suggested by Marlette AW, to provide that a prescriptive easement is established automatically and becomes an appurtenance upon expiration of the 15 year statutory period.

Fortunately, existing Michigan decisions offer an approach that would harmonize the *Wortman*, *Haab* and *Methner* decisions with the long line of cases requiring the current possessor to establish all the elements of a prescriptive easement by clear and cogent evidence. Employing a slightly different analysis than *Haab* and *Wortman*, the court in *von Meding v Strahl*, 319 Mich 598, 614-615; 30 NW2d 363 (1947) held that long-standing use can provide a basis for finding privity even in the absence of a transfer by deed or express oral statements, where the claimant was well acquainted with the property and easement at the time of transfer. In these circumstances, it is fair to conclude that the parties understood that the easement was available to the current possessor of the land even if the same had not been mentioned in the deed or in direct parol statements. The issue in *von Meding* was whether several of plaintiffs' neighbors had acquired an easement to use a pathway to the beach through plaintiffs' property. The suit was brought in 1941; there was evidence that the pathway had been in use continuously since 1916. The Court determined a number of neighbors had received valid easements appurtenant by way of grant. Others, however, did not, and their claims were analyzed as prescriptive easements. The Flanagans, owners of one such parcel, had only owned their property for 13 years and therefore were required to tack their use to their predecessors':

> We are satisfied from the record that the Flanagans, owners of parcel 11, were well acquainted with the Dillenbecks from whom they acquired the title, that they had visited and remained on the property and had used the strip for many years prior to their acquisition of the title to the property. The easement was so jointly used by the neighbors that it was considered as appurtenant to all of the lands. The conclusion is inescapable that in 1928 when the Flanagans purchased the land, the parties must have understood that an easement was appurtenant to the land, parcel 11. Undoubtedly it was the intention of Dillenbeck to transfer her rights to the easement to the Flanagans. The record leads us to the conclusion that there was a parol transfer by Mrs. Dillenbeck to the Flanagans of her rights in the easement sufficient to permit the Flanagans to tack the prior adverse use[] of Mrs. Dillenbeck to their own adverse use[] to make up the prescriptive period.

Id. at 614-615. More recently, the Court of Appeals in *Matthews v Dept of Natural Resources*, 288 Mich App 23, 41-42; 792 NW2d 40 (2010) followed *von Meding*, holding that the where the current owners of landlocked property obtained title from family members who originally purchased the property in 1969, and had visited the property since the 1970's and had always gained access to the property via a pathway across state-owned land, that the parties must have understood that there was an easement appurtenant to the land when it was conveyed to current property owners. This satisfied the privity requirement for the purposes of establishing a prescriptive easement. "Indeed, to hold otherwise would needlessly impose an artificial requirement on parties in similar circumstances and would possibly work to deny parties their otherwise properly vested rights. Where predecessors and successors are so intimately acquainted as under the facts here, it would not be reasonably expected for the predecessors to expressly articulate to the successor a right that all parties already believed they possessed." *Id.* at 42.

The analysis in *von Meding* and *Matthews* could apply today to obtain the same result in *Wortman,*, and *Methner*[2] without negating the privity requirement. In *Wortman,* the party claiming a prescriptive easement obtained title to the property upon his father's death and was well acquainted

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[2] *Haab* may well fall into this same category. However, the factual recitation in the Court's opinion was not sufficient to determine the extent of the current owner's familiarity with the property.

with the property and the lane that had been used for access for several decades. The court noted that there was no mention of the easement in his deed, but did not seem to consider whether there was evidence of a parol transfer. Under the holdings of *von Meding* and *Matthews*, the son's long familiarity with the property and the claimed easement at the time of transfer would satisfy the privity requirement. Similarly, in *Methner*, plaintiffs had owned property on the same block as the disputed property for over 26 years before the dispute arose. When they purchased a neighboring building in 2011, they knew, from their long acquaintance with the property, that the disputed property had been used to access the rear of the building for all those years. Under the circumstances presented by this case, *von Meding* and *Matthews* provide a basis for finding privity, where the long-standing use of the access parcel was so open and notorious and known to the successor at the time of transfer that "the parties must have understood that the easement was appurtenant to the land." *von Meding* at 614.

Under existing Michigan law, a party seeking a prescriptive easement across another's land is an adverse possessor, and he must establish that he is entitled to the prescriptive easement in his own right by clear and cogent evidence. He is not entitled to rely upon his predecessor's adverse possession of the property, unless there is privity of estate between him and his predecessor. The only exception to this rule is in the case of an easement that has been used openly, notoriously and continuously for many years in excess of the statutory period, giving rise to a presumption of a grant of an easement. In that case, the easement right is effectively considered attached to the land and conveyed to a successor even in the absence of privity of estate, or stated differently, the many years of use substitutes for privity. These rules appropriately protect the reasonable expectations of the claimant and the property rights of the owner of the servient estate. Therefore, the Court of Appeals correctly found in *Marlette* that the plaintiff was not entitled to a prescriptive easement where it could not establish privity of estate between itself and its predecessor, and where there were not sufficient findings of fact to bring it within the "many years" exception.

3. Judicial or other action is required by one claiming a prescriptive easement before title to the easement will vest in him and run with the dominant estate as an easement appurtenant.

Title to a prescriptive easement should not vest without judicial action. Marlette AW urges this Court to adopt a rule that title to a prescriptive easement vests "automatically" after 15 years. The cases noted above that purport to stand for the proposition that obtaining title to a prescriptive easement is self-executing should, at most, be limited to their facts. As set forth above, the claimant must first establish, by clear and cogent evidence, that all elements of a prescriptive easement have been met. It is only upon this showing that a court may determine that title vested in the claimant and, if relevant, when the vesting of the claimant's rights occurred.

In support of its argument for "automatic" vesting, Marlette AW relies upon *Gorte v Department of Transportation*, 202 Mich App 161, 507 NW 2d 797 (1993) and *Matthews*, supra. Those cases are distinguishable in important respects. Most significantly, in each case, the issue before the Court was when the right to a prescriptive easement had vested in the claimant, not whether an easement had vested in the claimant's predecessor in title. The timing of vesting was critical, because in both cases the claimant asserted a prescriptive easement across state-owned land. In 1988, the state legislature amended the 15 year statute of limitations for recovery or possession of land to provide that the statute does not run against the state. Therefore, in both *Gorte* and *Matthews*, the claimants had to prove that their easement rights vested prior to 1988, years before the suits were brought. There is no doubt that a court may determine that the right to claim a prescriptive easement vested prior to bringing suit. Both *Gorte* and *Matthews* recognize that rule, as did the Court of Appeals in *Marlette*. However, the inquiry is properly limited to when the right vested in the claimant, not his predecessor who did not assert a claim.

In *Gorte*, the court wrote: "Generally, the expiration of a period of limitation vests the rights of the claimant....Michigan courts have followed the general rule that the expiration of the period of

limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession." *Gorte* at 168; emphasis added. Therefore, the court concluded that if the plaintiffs had met all of the elements for adverse possession before 1988, their claim against the state was not precluded. The trial court had ruled that the plaintiffs' interest in the property vested prior to 1988, and the Court of Appeals affirmed.

Similarly, the court in *Matthews* wrote: ".In other words, the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession." *Matthews* at 36-37. As in *Gorte*, the trial court had ruled that the plaintiffs' rights vested prior to 1988, because although the plaintiffs did not acquire the property until 1984, they were able to tack to their predecessors to establish continuous use for 15 years prior to 1988. The Court of Appeals affirmed.

Marlette AW misconstrues the import of the court's language in *Gorte* and *Matthews* regarding the vesting of title upon the expiration of the period of limitations. The Court of Appeals in *Marlette* correctly understood that these cases speak only to the vested interest of a claimant, not his predecessor who never took action to assert his claim, and therefore properly rejected Marlette AW's argument that the easement "automatically" vested in its predecessor. The Court of Appeals stated:

> It is true that a prescriptive easement, like property acquired through adverse possession, vests when the statutory period expires and not when the action is brought. See *[Matthews]* at 36. However, the person claiming a prescriptive easement must acknowledge or act on the purported acquired right; 'the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in *the party* claiming adverse possession. *Gorte v Dep't of Transp*, 202 Mich App 161, 168; 507 NW2d 797 (1993)(emphasis added). It is undisputed that no previous owner of the car wash asserted a claim of prescriptive easement with regard to defendant's property.

This Court should grant leave so that it can, in the context of the affirming the Court of Appeals decision and adopting the holding of *Marlette*, clarify that the *Wortman, Haab*, *Methner*, *Matthews* and *von Meding* cases are not inconsistent with the Court of Appeals ruling in *Marlette*

because these cases are not to be understood to mean that title to a prescriptive easement automatically arises at the end of the prescriptive period and thereafter runs with the land. Rather, title vests in a claimant once it is determined that all of the elements of a prescriptive easement have been met. A court may find that title vested in the claimant prior to bringing suit, but it may not determine that title vested in the claimant's predecessor who took no action to assert his claim. At best, that predecessor had a vested right to assert a claim for prescriptive easement. If the predecessor failed to seek a court determination of the existence of a prescriptive easement, the right to make a claim continues in a subsequent adverse possessor so long as there is privity of estate by virtue of a reference of same in a deed or by a parol statement.

Furthermore, it is important to note that there is no obligation for an adverse possessor to seek a court determination. The adverse possessor can convey title to the property together with any rights to a prescriptive easement. This could continue indefinitely until the owner of the servient estate prevents use by the owner of the dominant estate. Only then is the prescriptive easement claimant forced to seek a court ruling. However, until that time, the right to assert that a prescriptive easement exists does not ripen into legal title, and become an easement appurtenant that runs with the land. The "many years" exception could remain an exception to this general rule, where a property owner could become eligible for the presumption of easement described in *Haab, Wortman* and *Methner*. Alternatively, the "many years" exception, as described in *von Meding* and *Matthews,* could simply be viewed as a third alternative means of establishing privity of estate consistent with parol statements, and thus remaining true to the general rule requiring privity.

IV. CONCLUSION

This Court should grant the application for leave to appeal in order to reaffirm and clarify important aspects of Michigan law regarding the vesting of prescriptive easement rights. The decision in *Marlette* was correct, but there is potential conflict between it and the subsequent decision in

Methner. The Court should reject the invitation to create a rule that a prescriptive easement vests "automatically" after 15 years and is thereafter transferred to a subsequent owner even in the absence of privity of estate. Such a rule is not consistent with long-standing Michigan law that requires the claimant to establish all elements for a prescriptive easement, including privity of estate, by clear and cogent evidence. Furthermore, such a rule would create havoc for property owners, who could be subject to claims for unrecorded easements that allegedly vested in prior property owners many years before, even if the prescriptive use has not been continuous, open and obvious during the previous 15 years. Such a rule is not consistent with the policy underpinnings of prescriptive easements and would create an unworkable precedent.

Respectfully submitted,

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